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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

LINDA A. THOMAS,

Petitioner,

v.

STATE OF LOUISIANA,
DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Heck v. *Humphrey*, 512 U.S. 477, 486 (1994), bars an incarcerated prisoner from challenging the fact or duration of imprisonment through a civil rights suit. Instead, a prisoner must first favorably overturn the conviction before suing for damages. *Ibid.* Seven federal courts of appeals have found that *Heck*'s "favorable-termination" requirement does not apply to suits by non-incarcerated individuals who never had, as a practical matter, recourse to federal habeas. Four circuits disagree. Applying the minority approach, the court below found that *Heck* barred certain claims premised on the invalidity of the criminal conviction, even though petitioner's fourteen-day term of imprisonment rendered federal habeas impossible. Accordingly, the question presented is:

Does *Heck*'s favorable-termination requirement apply when circumstances—such as a short period of incarceration or sentence of probation—render federal habeas relief unavailable?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Linda A. Thomas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-17a) and the district court (App., *infra*, 18a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

In *Heck* v. *Humphrey*, 512 U.S. 477, 486 (1994), the Court concluded that an incarcerated prisoner with access to federal habeas may not bring a federal civil-rights claim that would have the effect of invalidating a criminal conviction. Before suing for damages, a prisoner must first overturn the conviction. *Id.* at 486-487. Subsequently, in *Spencer* v. *Kemna*, 523 U.S. 1 (1998), five Justices expressed the view that *Heck*'s favorable-termination requirement does not apply to individuals who are not incarcerated and who have never had, as a practical matter, recourse to federal habeas.

In the wake of *Spencer*, the lower courts have deeply divided on this question. Seven circuits do not apply *Heck* in circumstances where a claimant had no ability to obtain relief via federal habeas. Four circuits disagree, refusing to carve an impossibility exception to *Heck*.

In *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam), the Court granted certiorari to address the impossibility exception. See *Muhammad* v. *Close*, 539 U.S. 925 (2003) (questions granted). But the Court resolved the case on a different ground, noting that this issue remains open. 540 U.S. at 752 n.2.

This case squarely presents the question whether *Heck* applies in circumstances where a claimant has no recourse to federal habeas. Here, petitioner filed formal grievances against her supervisor at the Louisiana Department of Social Services ("LDSS"). The state subsequently fired her on allegations that she improperly granted food-stamp benefits to family members. After petitioner appealed this action as retaliatory, LDSS pursued criminal charges, which resulted in a conviction and a fourteen-day period of incarceration.

Petitioner filed a civil suit contending, in part, that she was falsely arrested and falsely imprisoned. The Fifth Circuit found these claims barred by *Heck*, even though petitioner never had an opportunity to pursue federal habeas. The court expressly noted that this case implicates the circuit conflict, but it relied on circuit precedent that rejected an impossibility exception to *Heck*.

Because this case presents an important question that has deeply divided the circuit courts, the Court should grant certiorari.

A. The *Heck* Favorable-Termination Rule.

This Court has long sought to reconcile federal civil rights suits that challenge state convictions with congressionally imposed limitations on federal habeas. In a series of cases, the Court has restricted

the ability of prisoners to use civil rights claims as an end-run around the habeas statute.

In *Preiser* v. *Rodriguez*, 411 U.S. 475, 476 (1973), plaintiffs were state prisoners who challenged a deprivation of their good-time credits. Their Section 1983 suit sought an injunction to compel restoration of the credits, which would effectively have released them from custody. *Ibid.* Such relief, the Court found, "fell squarely within this traditional scope of habeas corpus." *Id.* at 487. And habeas requires "exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief." *Id.* at 489. Thus, it "would wholly frustrate explicit congressional intent" to allow a plaintiff to "evade this requirement" through use of a civil rights suit. *Id.* at 489-490. The Court concluded that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500.

In *Heck*, 512 U.S. at 481-486, the court extended *Preiser* to prisoner suits that seek damages only. "We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to [Section] 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 486. Rather, in order to bring a civil rights claim, a "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal

court's issuance of a writ of habeas corpus." *Id.* at 486-487. This is *Heck*'s "favorable-termination" requirement.

In concurrence, Justice Souter (joined by Justices Blackmun, Stevens, and O'Connor), noted that a "sensible way to read" the majority opinion is that it applies only to "*prison inmates* seeking [Section] 1983 damages in federal court for unconstitutional conviction or confinement." *Heck*, 512 U.S. at 500 (Souter, J., concurring) (emphasis added). Individuals not "in custody" for purposes of federal habeas, such as "people who were merely fined, * * * who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences," need not show "favorable termination." *Ibid.* To hold otherwise, Justice Souter explained, would be "an untoward result" because "individuals not 'in custody' cannot invoke federal habeas jurisdiction." *Ibid.* The *Heck* doctrine, according to Justice Souter, should not "shut off federal courts altogether" to claims challenging state criminal convictions. *Id.* at 501.

In *Spencer*, 523 U.S. at 14-16, the Court concluded that a federal habeas petition was moot because the petitioner, who had completed his term of incarceration, was unable to show collateral consequences sufficient to satisfy Article III's case-or-controversy requirement.

Justice Souter concurred, joined by Justices O'Connor, Ginsburg, and Breyer. Justice Souter reiterated his position from *Heck*, contending that the favorable-termination requirement applies only to individuals who have had adequate recourse to federal habeas. A broader rule would be "unsound."

Spencer, 523 U.S. at 19 (Souter, J., concurring). Justice Ginsburg wrote separately: "Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within [Section] 1983's 'broad reach.'" *Id.* at 21 (Ginsburg, J., concurring). In dissent, Justice Stevens also agreed. *Id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear * * * that he may bring an action under 42 U.S.C. § 1983.").

Finally, in *Muhammad* v. *Close*, 540 U.S. 749 (2004), the Court granted certiorari on two questions: first, whether *Heck* applies to prison disciplinary proceedings that do not affect the fact or duration of the underlying sentence, and second, if so, whether an impossibility exception applies. See 539 U.S. at 925. After finding *Heck* not implicated (*Muhammad*, 540 U.S. at 754-755), the Court explained that there was "no occasion to settle" whether the "unavailability of habeas * * * may * * * dispense with the *Heck* requirement" (*id.* at 752 n.2).

B. Proceedings Below.

This case arises from an employment dispute between petitioner and respondent, LDSS—a dispute that led the state to pursue criminal charges against petitioner. Petitioner was ultimately convicted of misdemeanor theft and imprisoned for fourteen days. Petitioner brought this suit, in part, to challenge the conviction. She contends both that the state criminal charges were retaliatory and that LDSS had no cause to initiate criminal proceedings. Ultimately, certain of petitioner's claims were dismissed pursuant to the *Heck* bar, notwithstanding that peti-

tioner's short period of incarceration rendered federal habeas unavailable.

1. Petitioner's state employment and Hurricane Katrina.

Petitioner was employed by the State of Louisiana between 1989 and 2007. In 2007, she worked for the Terrebonne Parish Office of Family Support of the LDSS. App., *infra*, 2a. One of petitioner's duties was to determine whether applicants were eligible for state financial assistance to purchase groceries (colloquially, food stamps) and to issue electronic benefits transaction cards to those who qualified. *Ibid.*

On August 29, 2005, Hurricane Katrina made landfall in Louisiana. "Clearly, Hurricane Katrina was one of the most devastating hurricanes that has ever hit the United States, generating the largest storm surge elevations in the history of the United States." *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 678 (E.D. La. 2009).

Terrebonne Parish—which is located directly on the Gulf Coast—was among the areas heavily affected by Hurricane Katrina. The Federal Emergency Management Agency designated the parish for all forms of available federal relief. See FEMA, Louisiana Hurricane Katrina, Major Disaster Declared Aug. 29, 2005 (DR-1603), http://tinyurl.com/6dgszwn.

During the aftermath of Katrina, volunteers assisted LDSS in processing eligibility for state benefits, including emergency benefits. These volunteers used the account login information of state permanent employees. Also during this period, several normal operating procedures were suspended. See Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J., Exs.

A. C. & D. No. 08-cv-4977, Dkt. #24 (E.D. La.) ("Pet. S.J. Br.").

2. Petitioner's employment grievance and subsequent termination.

Several employees in the Terrebonne Parish office of LDSS had difficulty working with a particular agency administrator—Bonnie Rehage. In 2003, an employee filed a grievance against supervisors, including Rehage, and petitioner served as a witness. Pet. S.J. Br., Ex. A.

In early 2007, petitioner had several negative interactions with Rehage. On March 28, 2007, petitioner filed a formal grievance against Rehage, alleging workplace discrimination and mistreatment. Pet. S.J. Br., Exs. A & B.

After petitioner filed this grievance, LDSS alleged that petitioner had improperly provided state benefits to relatives in the months immediately following Hurricane Katrina. These actions allegedly violated agency procedures barring employees from administering benefits for family members. On November 1, 2007, LDSS sent petitioner a letter terminating her employment. App., *infra*, 2a; Mot. for Summ. J., Ex. B, No. 08-cv-4977, Dkt. #21 (E.D. La.) ("State S.J. Br.").

The next day, petitioner appealed the agency action to the Louisiana Department of Civil Service. Pet. S.J. Br., Ex. A. She contended that she was innocent of wrongdoing, and further argued that she was terminated as retaliation for her prior testimony in 2003 and her own administrative grievance. *Ibid.*

3. Criminal proceedings and incarceration.

Following petitioner's appeal of the employment action, LDSS referred the matter to a state prosecutor. On November 10, 2007, the state arrested petitioner on felony charges of theft in excess of $500 and malfeasance of office. Asserting her innocence, petitioner rejected the state's efforts to secure a plea bargain and demanded a jury trial. See Docket, State v. Thomas, No. 07-FELY-496657 (La. Dist. Ct.).

The criminal case came to trial on September 16, 2009. Petitioner again requested a jury trial. The state, however, amended the information, replacing the felony charges with a claim for misdemeanor theft of less than $300. Because this eliminated petitioner's right to a jury trial, she specifically objected to the state's decision to *reduce* the charges and instead requested a jury trial for a felony. State S.J. Br., Ex. F. The court overruled her objection, held a bench trial, and convicted petitioner of the misdemeanor. *Ibid.* She was sentenced to six months imprisonment (with all but thirty-one days suspended), a fine of $500, restitution of $2,133, and community service. *Ibid.* Petitioner ultimately served fourteen days in jail. App., *infra*, 3a.

4. Petitioner's civil rights action.

On October 17, 2008, petitioner filed suit in Louisiana state court, alleging that her termination was discriminatory in violation of Title VII. App., *infra*, 3a. She also contended that LDSS's retaliatory action caused a false arrest and false imprisonment. *Ibid.* LDSS removed the action to federal court, which stayed the action pending the state criminal proceeding. *Ibid.*

a. Following resolution of the criminal matter, LDSS moved for summary judgment. With respect to the claims for false arrest and false imprisonment, LDSS contended, in part, that *Heck* favorable-termination rule barred their consideration: "an award of civil damages to plaintiff for these causes of action would challenge the validity of her criminal conviction in violation of the legal principle recognized in *Heck v. Humphrey*." State S.J. Br. 8. But Thomas objected, arguing that *Heck* is inapplicable because "she is no longer in prison and has already served her term." Pet. S.J. Br. 6.

The district court granted summary judgment on all claims. App., *infra*, 19a-26a. It dismissed the Title VII claims, finding an "absence of the presentation of competent evidence by plaintiff." *Id.* at 26a. The court did not specify its grounds for dismissing the false arrest and false imprisonment claims.

b. The Fifth Circuit affirmed. Like the district court, it dismissed the Title VII discrimination and retaliation claims on the basis of a lack of evidence. App., *infra*, 11a-13a.

With respect the false arrest and false imprisonment claims, the court accepted LDSS's invocation of the *Heck* bar. See Br. of Appellee, at 15, No. 10-30607 (5th Cir.) ("[A]n award of civil damages to plaintiff for these causes of action would challenge the validity of her criminal conviction in violation of the legal principle recognized in *Heck v. Humphrey*."). The court found that the petitioner "has never contested the fact of her criminal conviction and has not presented any evidence that it was terminated in her favor" (App., *infra*, 14a), and further that "her claims for false arrest and false imprisonment * * * would necessarily require the district court to re-

evaluate the lawfulness of her arrest and criminal conviction because proof of those claims requires proof that both were unlawful" (*ibid*). *Heck*'s "favorable termination rule," the court concluded, "bars her state law false imprisonment and false arrest claims." *Ibid*.[1]

The court specifically noted that petitioner had asserted that an impossibility exception to the *Heck* favorable-termination requirement saved her claim, but the court found the argument "unavailing * * * because this circuit applies the favorable termination rule even when the plaintiff is no longer in custody." App., *infra*, 15a (citing *Randell* v. *Johnson*, 227 F.3d 300, 301-302 (5th Cir. 2000)). The court nonetheless "noted that several other circuits do not apply *Heck's* favorable termination rule when the plaintiff is no longer in custody." *Id.* at 15a n.5. And citing this Court's opinion in *Muhammad*, it further observed that "this issue is unsettled." *Ibid*.[2]

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[1] The claims at issue here are state-law causes of action for false arrest and false imprisonment, not actions brought under Section 1983. App., *infra*, 3a. The court below nonetheless accepted respondent's invitation to apply the *Heck* doctrine, finding it to "apply with equal force to state law claims." *Id.* at 14a n.4. The court thus decided this case by applying the federal rule stated in *Heck*. Accordingly, the question whether *Heck* contains an impossibility exception necessarily was decided below and controlled the outcome in this case, and the question of *Heck*'s meaning therefore is properly presented for this Court's review. See *City of Revere* v. *Mass. Gen. Hosp.*, 463 U.S. 239, 242 (1983) (review appropriate "[b]ecause the [lower] court's decision was based on an interpretation of federal law").

[2] The court also offered as an alternative basis for affirmance that, even apart from *Heck*'s favorable-termination rule, she could not succeed in her suit because "she was convicted of the crime for which she was arrested and imprisoned" and "[t]he

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the "unsettled" question that has long divided the courts of appeals. Since the Court decided *Spencer* in 1998, eleven courts of appeal have addressed this issue. Seven courts do not apply *Heck*'s favorable-termination bar when the circumstances of the criminal conviction render federal habeas impossible. Four circuits, including the court below, disagree.

Granting certiorari here is particularly important because this question is one of substantial importance. In just the past three years alone, the issue has arisen in at least 71 cases in the district courts—and this number likely fails to capture the true import of the doctrine. The courts are resolving this question with drastically different results, based on nothing more than geography. Such an issue is ripe for definitive resolution by this Court. Indeed, the Court *already has* granted certiorari on the question, but resolved the case on a different ground. See *Muhammad*, 540 U.S. at 752 n.2.

Despite its substantial practical importance, the question is rarely presented for review in this Court. In the seven years since *Muhammad* was decided, only four paid petitions have presented this question, and none offered a suitable vehicle for resolving it.

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torts of false arrest and false imprisonment both require [petitioner] to prove that she was detained and that the detention was unlawful." App., *infra*, 14a n.4. But that circular reasoning is not an alternative basis to reject her claim. State law merely requires petitioner to prove the unlawfulness of her arrest and imprisonment. See *Harrison* v. *Louisiana*, 721 So. 2d 458, 464 n.9 (La. 1998). That is precisely what she is trying to do in this suit, and what she is prohibited from doing by application of *Heck*.

This case, by contrast, presents an ideal opportunity to definitely resolve whether *Heck*'s favorable-termination requirement applies in circumstances where a claimant has had no opportunity to pursue federal habeas.

A. The Circuits Are Intractably Divided With Respect To The Question Presented.

The conflict among the courts of appeals is well-recognized, longstanding, and persistent. The Tenth Circuit, for example, recently noted that "[t]he circuits have split on the question of whether the *Heck* favorable-termination requirement applies when the plaintiff lacks an available habeas remedy." *Cohen* v. *Longshore*, 621 F.3d 1311, 1315 (10th Cir. 2010). The Fourth Circuit has also recognized "the circuit split" on this question. *Wilson* v. *Johnson*, 535 F.3d 262, 267 (4th Cir. 2008). So too have numerous district courts. See, *e.g.*, *Ferenc* v. *Haynes*, 2010 WL 4667569, at *4 (N.D. Fla. 2010) ("circuits are split on the issue"); *Aljammi* v. *Wall*, 2009 WL 3615977, at *3 (D.R.I. 2009) (noting a "circuit divide"); *Domotor* v. *Wennet*, 630 F. Supp. 2d 1368, 1375 (S.D. Fla. 2009) (a "circuit split"); *Ference* v. *Twp. of Hamilton*, 538 F. Supp. 2d 785, 790 (D.N.J. 2008) (the "circuits are not in accord"); *Clark* v. *McLean Cnty.*, 2008 WL 5236036, at *10 (D.N.D. 2008) ("there is a split in the federal circuit courts"); *Sandles* v. *U.S. Marshal's Serv.*, 2007 WL 4374080, at *9 (E.D. Mich. 2007) ("a split in the circuits"). Only this Court may resolve the dispute.

1. Seven circuits apply an impossibility exception to Heck's favorable-termination requirement.

Contrary to the rule applied below, seven circuits recognize an impossibility exception to *Heck*'s favorable-termination requirement. These courts permit a civil rights claim absent favorable termination where the circumstances—such as a particularly short period of incarceration—render federal habeas relief impossible. Had petitioner's suit been brought in any of these seven circuits, her claims could not have been dismissed pursuant to *Heck*.

The Tenth Circuit, for example, recently canvassed the "circuit split" and joined the majority of circuits that recognize an impossibility exception to *Heck*. *Cohen*, 621 F.3d at 1315. There, an individual in immigration custody challenged his incarceration via a federal habeas petition, but he was transferred out of custody, mooting a pending habeas action. *Ibid.* The court, relying on *Spencer*, explained that "[i]f a petitioner is unable to obtain habeas relief—at least where this inability is not due to the petitioner's own lack of diligence—it would be unjust to place his claim for relief beyond the scope of [Section] 1983." *Id.* at 1316-1317. Thus the court held "that a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a [Section] 1983 claim." *Id.* at 1317.

In so concluding, the court drew heavily on the Sixth Circuit's holding in *Powers* v. *Hamilton County Public Defender Commission*, 501 F.3d 592 (6th Cir. 2007). Reviewing *Heck* and *Spencer*, that court determined that "a [Section] 1983 plaintiff is entitled to a *Heck* exception if the plaintiff was precluded 'as a

matter of law' from seeking habeas redress, but not entitled to such an exception if the plaintiff could have sought and obtained habeas review while still in prison but failed to do so." *Id.* at 601. The plaintiff there was entitled to such an exception because "his term of incarceration—one day—was too short to enable him to seek habeas relief." *Ibid.* See also *S.E.* v. *Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 639 (6th Cir. 2008) ("[T]he *Heck* bar to [Section] 1983 litigation [does] not require a favorable termination of the criminal proceedings for plaintiffs who were not eligible to make habeas petitions.").

The Fourth Circuit has reached the same result. In *Wilson*, 535 F.3d at 263, a prisoner's release date was extended approximately three months. Following the extension, the prisoner filed administrative grievances, but the Virginia Department of Corrections did not resolve his claim administratively prior to his release. *Id.* at 263-264. Because of this short period of incarceration, the prisoner could not obtain relief via federal habeas. *Id.* at 268 n.8. The court concluded that *Heck*'s favorable-termination requirement does not apply in circumstances where "a prisoner could not, as a practical matter, seek habeas relief." *Id.* at 268. Holding otherwise would "would leave [the prisoner] without access to any judicial forum in which to seek relief for his alleged wrongful imprisonment." *Ibid.*

The Ninth Circuit also has declined to apply *Heck* when the circumstances render federal habeas unavailable. See *Nonnette* v. *Small*, 316 F.3d 872, 876-877 (9th Cir. 2002). Like the Fourth, Sixth, and Tenth Circuits, the Ninth Circuit has restricted the exception to only those cases in which an individual never had an opportunity to seek federal habeas, de-

clining to permit claims by individuals who did not diligently seek relief while incarcerated. See *Guerro* v. *Gates*, 442 F.3d 697, 703-705 (9th Cir. 2006).

The Second Circuit similarly permits civil rights actions where federal habeas is impossible. In *Huang* v. *Johnson*, 251 F.3d 65, 75 (2d Cir. 2001), for example, the court concluded that *Heck* does not bar a claim when federal habeas is unavailable. See also *Leather* v. *Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (finding *Heck* inapplicable where a plaintiff was never incarcerated and thus "has no remedy in habeas corpus").

The Seventh Circuit, too, recognizes an impossibility exception. In *Carr* v. *O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999), the court concluded that, with respect to a prison disciplinary sanction (a context in which *Heck* applies equally), when it is impossible for a prisoner "to get the disciplinary sanction reversed, five Justices would not consider the sanction a bar to a [S]ection 1983 suit even though that suit calls into question the validity of the sanction." And in *DeWalt* v. *Carter*, 224 F.3d 607, 617 (7th Cir. 2000), the court explained that "[t]he concurring and dissenting opinions in *Spencer* reveal that five justices now hold the view that a [Section] 1983 action must be available to challenge constitutional wrongs where federal habeas is not available."[3]

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[3] Courts in the Seventh Circuit have largely understood *DeWalt* to settle this question. See, *e.g.*, *James* v. *Ill. Sexually Dangerous Persons Act*, 2009 WL 2567910, at *2 (S.D. Ill. 2009). But at least one court in the circuit viewed this as an open issue and subsequently declined to require an impossibility exception. See *Malden* v. *City of Waukegan*, 2009 WL 2905594, at *13-14 (N.D. Ill. 2009).

Finally, although its holdings have not been altogether consistent, it appears that the Eleventh Circuit also recognizes an impossibility exception. In *Harden* v. *Pataki*, 320 F.3d 1289, 1295 (11th Cir. 2003), habeas was unavailable to an individual extradited from Georgia. Adopting the Second Circuit's view, the court explained "'five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, [Section] 1983 must be.'" *Id.* at 1298 (quoting *Jenkins* v. *Haubert*, 179 F.3d 19, 26 (2d Cir. 1999)). The Fourth Circuit (*Wilson*, 535 F.3d at 267 n.7), the Sixth Circuit (*Powers*, 501 F.3d at 603), and the Tenth Circuit (*Cohen*, 621 F.3d at 1315-1316) all point to *Harden* as aligning the Eleventh Circuit with the majority approach that recognizes an impossibility exception to *Heck*'s favorable-termination requirement.

But two years later, the court—without citing *Harden*—stated that it "has not yet weighed in on this issue," but, in *dicta*, noted that a majority of the Supreme Court has "expressed the view that [Section] 1983 claims are barred only when the alternative remedy of habeas relief is available." *Abusaid* v. *Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1315 n.9 (11th Cir. 2005). The court retraced this analysis in *McClish* v. *Nugent*, 483 F.3d 1231 (11th Cir. 2007).[4]

Any doubt in that court, however, is most likely put to rest by *Morrow* v. *Federal Bureau of Prisons*,

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[4] Relying on *Abusaid* and *McClish*'s characterization of the issue as an open question in the circuit, some district courts declined to apply the impossibility exception. See *Domotor*, 630 F. Supp. 2d at 1375-1380; *Gray* v. *Kinsey*, 2009 WL 2634205, at *9 (N.D. Fla. 2009).

610 F.3d 1271, 1272 (11th Cir. 2010). There, the court declined to apply *Heck*, both because the claimant was "not in custody" and because the action would not "impl[y] the invalidity of his conviction." *Ibid.* "This case," the court found, "is one in which the alleged length of unlawful imprisonment—10 days– is obviously of a duration that a petition for habeas relief could not have been filed and granted while Plaintiff was unlawfully in custody." *Ibid.* Judge Anderson concurred specially to emphasize his view that *Heck* does not apply to individuals who "are no longer in custody and who, despite due diligence, could not have obtained habeas corpus relief." *Id.* at 1273-1274 (Anderson, J., concurring specially).

2. Four circuits have rejected an impossibility exception.

In contrast, the First, Third, Fifth, and Eighth Circuits have rejected an impossibility exception to *Heck*.

In *Figueroa* v. *Rivera*, 147 F.3d 77, 79-81 (1st Cir. 1998), a prisoner died while his habeas action was pending, causing the court to dismiss it as moot. Members of his family brought a civil claim, but the First Circuit declined to "[c]reat[e] an equitable exception" to *Heck*. *Id.* at 81. Doing so, the Court reasoned, "would fly in the teeth of *Heck*." *Ibid.* Several district courts in that circuit have recognized that *Figueroa* rejected the rule, adopted by "several Circuits," that "*Heck* would not apply where it is impossible as a matter of law for a plaintiff to meet the 'favorable termination' rule." *Limone* v. *United States*, 271 F. Supp. 2d 345, 360 (D. Mass. 2003).[5] See also

[5] The district court in *Limone* termed *Figueroa*'s reasoning "puzzling," insofar as "adopting the *Spencer* discussion of 'fa-

Aljammi, 2009 WL 3615977, at *3; *Davis* v. *Schifone*, 185 F. Supp. 2d 95, 99 (D. Mass. 2002).

The Third Circuit has followed *Figueroa*. In *Gilles* v. *Davis*, 427 F.3d 197, 209-210 (3d Cir. 2005), the court "recognize[d] that concurring and dissenting opinions in *Spencer* v. *Kemna* * * * question the applicability of *Heck* to an individual * * * who has no recourse under the habeas statute." But the court "doubt[ed] that *Heck* has been undermined," and it joined the First Circuit in holding that *Heck* applies, even when habeas is impossible. *Id.* at 210. See also *Williams* v. *Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006) ([A] [Section] 1983 remedy is not available to a litigant to whom habeas relief is no longer available.").[6]

In *Entzi* v. *Redmann*, 485 F.3d 998, 1003-1004 (8th Cir. 2007), the Eighth Circuit also adopted *Figueroa*, concluding that the "favorable-termination rule bars" a civil rights action, even "when habeas corpus relief is unavailable." See also *Abdullah* v. *Minn.*, 261 F. App'x 926, 927 (8th Cir. 2008) (per cu-

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vorable termination' would *not overrule* or even *weaken Heck* but rather would merely refine and explain its application to a set of facts that was not before the *Heck* Court." *Limone*, 271 F. Supp. 2d at 360-361.

[6] There appears to be some confusion in the Third Circuit, however. Subsequent to the court's published decision in *Gilles*, the court, in an unpublished opinion, cited Second Circuit precedent to recognize and apply the impossibility exception. *See Mendoza* v. *Meisel*, 270 F. App'x 105, 107 (3d Cir. 2008) (per curiam) ("*Heck* does not bar a [Section] 1983 claim where the plaintiff is unable to challenge his conditions of confinement through a petition for federal habeas corpus."). In *Wilson*, 535 F.3d at 267 n.6, the Fourth Circuit noted this apparent inconsistency. Such confusion highlights the need for the Court to bring clarity to this pressing question.

riam) (citing *Entzi* for proposition that a plaintiff's "inability to obtain habeas relief does not preclude application of *Heck*").

Finally, the Fifth Circuit, in *Randell* v. *Johnson*, 227 F.3d 300, 301-302 (5th Cir. 2000), likewise followed *Figueroa* in rejecting an impossibility exception to *Heck*. The court thus refused to "relax *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction." *Id.* at 301. In this case, the court below relied exclusively on *Randell*, finding that it "remains good law in this circuit." App., *infra*, 15a n.5.

B. The Question Presented, Which This Court Has Expressly Acknowledged As Open, Requires Resolution.

In *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004), the Court granted certiorari on this very question. See 539 U.S. at 925 (granting certiorari, in part, to resolve "[w]hether a prison inmate who has been, but is no longer, in administrative segregation may bring a [Section] 1983 suit challenging the conditions of his confinement (i.e. his prior placement in administrative segregation) without first satisfying the favorable termination requirement of *Heck* v. *Humphrey*."). But because the Court decided the case on other grounds, it had "no occasion to settle the issue." *Muhammad*, 540 U.S. at 752 n.2. It did note, however, that "Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement." *Ibid.*

This lingering question is one of fundamental importance. Resolution of this issue will determine

whether individuals who have been convicted of a crime—but have had no ability to obtain federal habeas—may nonetheless use a federal forum to vindicate a civil right. There can be no doubt that such claims are of critical importance in the constitutional structure. See *Bounds* v. *Smith*, 430 U.S. 817, 827 (1977) ("As this Court has constantly emphasized, habeas corpus and civil rights actions are of fundamental importance in our constitutional scheme because they directly protect our most valued rights." (alteration and quotations omitted)).

Like the lower courts (see page 12, *supra*), commentators have often noted the existence of a circuit split, frequently urging review by this Court. See, *e.g.*, Bruce Ellis Fein, Heck *v.* Humphrey *After* Spencer *v.* Kemna, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 25 (2002) (urging Supreme Court review); Nancy J. King & Suzanna Sherry, *Habeas Corpus & State Sentencing Reform*, 58 DUKE L.J. 1, 34 n.128 (2008) ("Courts have also divided about whether the *Heck* favorable-termination rule applies if the habeas remedy is unavailable"); Brian R. Means, FEDERAL HABEAS MANUAL § 2:7 (2010); Joseph D. Mueller, Note, *Pardon Me, But Can You Open That Door?*, 29 CARDOZO L. REV. 443, 453-454 (2007); 3 Sheldon Nahmod, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 9:58 n.6 (2010) (recognizing "a split in the circuits"); Note, *Defining The Reach of* Heck *v.* Humphrey, 121 HARVARD L. REV. 868 (2008).

And granting certiorari in this case is particularly important because the question presented has substantial practical importance—it is litigated with great frequency in the district courts across the country. In the past three years, from January 2008

to the present, the question of an impossibility exception to *Heck*'s favorable-termination requirement has arisen at least 71 times in district courts.[7] Four paid

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[7] A review of these decisions reveals that district courts confront this issue often, reaching vastly different results based on nothing more than geography. And this survey likely understates the importance of the issue, which doubtless has arisen in many unreported decisions, and—in light of settled circuit precedent—gone un-litigated in others.

At least 38 district courts have applied an impossibility exception in some fashion over the past three years. **Second Circuit:** *Barmapov* v. *Barry*, 2011 WL 32371, at *3-4 (E.D.N.Y. 2011); *Hirsch* v. *Desmond*, 2010 WL 3937303, at *4 n.5 (E.D.N.Y. 2010); *Rodriguez* v. *Fischer*, 2010 WL 438421, at *4 (E.D.N.Y. 2010); *Major Tours, Inc.* v. *Colorel*, 720 F. Supp. 2d 587, 600 n.7 (D.N.J. 2010); *Morse* v. *Nelson*, 2010 WL 466157, at *4 (D. Conn. 2010); *Rosato* v. *N.Y. Cnty. Dist. Att'ys Office*, 2009 WL 1790849, at *4 (S.D.N.Y. 2009); *Miner* v. *Goord*, 646 F. Supp. 2d 319, 323 (N.D.N.Y.); *Wheeler* v. *Pataki*, 2009 WL 674152, at *6 (N.D.N.Y. 2009); *Crowell* v. *Kirkpatrick*, 667 F. Supp. 2d 391, 402 (D. Vt. 2009); *Bock* v. *Gold*, 2009 WL 2365330, at *2 (D. Vt. 2009); *Tapp* v. *Tougas*, 2008 WL 4371762, at *1 n.1 (N.D.N.Y. 2008); *Jean-Laurent* v. *Hennessy*, 2008 WL 5274322, at *3 (E.D.N.Y. 2008); *El Badrawi* v. *Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 273 (D. Conn. 2008); *Davis* v. *Travis*, 2008 WL 5191074, at *2 (S.D.N.Y. 2008); *Peek* v. *Cummins*, 2008 WL 5110988, at *2 n.2 (W.D.N.Y. 2008); **Fourth Circuit:** *Oliver* v. *Conway City Magistrate Ct.*, 2010 WL 844646, at *4 n.5 (D.S.C. 2010); *Davis* v. *Ozmint*, 2010 WL 1294117, at *5 (D.S.C. 2010); *Brown* v. *Ozmint*, 2009 WL 2595633, at *5 n.8 (D.S.C. 2009); **Sixth Circuit:** *Zar* v. *Payne*, 2011 WL 93857, at *5 n.3 (S.D. Ohio 2011); *Kirk* v. *Muskingum Cnty. Ohio*, 2010 WL 3719286, at *3 (S.D. Ohio 2010); *Williams* v. *Caruso*, 2009 WL 960198, at *10-11 (E.D. Mich. 2009); *Ballinger* v. *City of Lebanon*, 2008 WL 4279583, at *4-5 (S.D. Ohio 2008); *Ferrell* v. *Seagraves*, 2008 WL 4763435, at *1 (E.D. Tenn. 2008); *Denton* v. *Hanifen*, 2008 WL 655984, at *3 (W.D. Ky. 2008); **Seventh Circuit:** *James*, 2009 WL 2567910, at *2 (S.D. Ill. 2009); **Ninth Circuit:** *Armstrong* v. *Benito*, 2010 WL 2572453, at *2 & n.2 (E.D. Cal. 2010); *Beckway* v. *DeShong*, 717

F. Supp. 2d 908, 916-917 (N.D. Cal. 2010); *Soos* v. *Mitchell*, 2010 WL 3985037, at *5 (C.D. Cal. 2010); *Medeiros* v. *Clark*, 713 F. Supp. 2d 1043, 1055-1056 (E.D. Cal. 2010), *West* v. *Mont.*, 2010 WL 2683396, at *3-4 (D. Mont. 2010) (recognized but not applicable under facts); *Davis* v. *Oregon*, 2009 WL 2475442, at *6 (D. Or. 2009); *Flores* v. *Morgen*, 2009 WL 1835905, at *8 (W.D. Wash 2009); *Battle* v. *Wick*, 2008 WL 4766818, at *5 (W.D. Wash. 2008); *Nickerson* v. *Portland Police Bureau*, 2008 WL 4449874, at *7-8 (D Or. 2008); *Quoc Xuong Luu* v. *Singh*, 2008 WL 961232, at *1 (E.D. Cal. 2008); *Jayne* v. *Schwarzenegger*, 2008 WL 780708, at *1 (E.D. Cal. 2008); *Wesbecher* v. *Landaker*, 2008 WL 2682614, at *4-5 (E.D. Cal. 2008) (recognized but not applicable under facts); *Mitchell* v. *City of Gardena*, 2008 WL 4189611, at *5 (C.D. Cal. 2008) (same)

In contrast, during that same period, at least 28 courts have declined to permit an impossibility exception. See, *e.g.*, **First Circuit:** *Aljammi*, 2009 WL 3615977, at *3 (D.R.I. 2009); *Chasse* v. *Merrill*, 2009 WL 837720, at *1 (D. Me. 2009); **Third Circuit:** *Kuniskas* v. *Walsk*, 2010 WL 1390870, at *3 (M.D. Pa. 2010); *Burch* v. *Pa.*, 2010 WL 1133336, at *4 (W.D. Pa. 2010); *Wood* v. *Pa. Bd. of Probation & Parole*, 2009 WL 1913301, at *5 (W.D Pa. 2009); *Derrickson* v. *Nolan*, 2008 WL 2888621, at *5 n.4 (W.D. Pa. 2008); *Ference*, 538 F. Supp. 2d at 790 (D.N.J 2008); *Jones* v. *Yale*, 2008 WL 2522427, at *2 (E.D. Pa. 2008); **Fifth Circuit:** *Ross* v. *Cole*, 2011 WL 196172, at *2 & n.13 (N.D. Tex. 2011), *Jefferson* v. *La. Dep't of Pub. Safety & Corr.*, 2010 WL 2360713, at *3 n.1 (W.D. La. 2010); *Roberson* v. *Owens*, 2010 WL 5185056, at *2 (E.D. Tex. 2010); *Tippett* v. *Foster*, 2010 WL 2891119, at *2 (N.D. Tex. 2010); *Joseph* v. *Tex. Bd. of Pardons & Paroles*, 2010 WL 723428, at *2 n.9 (W.D. Tex. 2010); *Whitehurst* v. *Reece*, 2009 WL 2757203, at *2 n.2 (E.D. Tex. 2009); *Roberson* v. *Davis*, 2009 WL 4884101, at *3 (N.D. Tex. 2009); *Kupka* v. *Livingston*, 2009 WL 820002, at *3 (S.D. Tex. 2009); *Brown* v. *Miss. Dep't of Corr.*, 2008 WL 4960467, at *4 n.2 (S.D. Miss. 2008); *Hearron* v. *Miss. Dep't of Corr.*, 2008 WL 4167796, at *2 (S.D. Miss. 2008); *Coleman* v. *Angelina Cnty. 217th Dist. Ct.*, 2008 WL 4755600, at *3 (E.D. Tex. 2008); *Timmons* v. *Quarterman*, 2008 WL 483450, at *2 (N.D. Tex. 2008); **Seventh Circuit:** *Malden*, 2009 WL 2905594, at *13-14 (N.D. Ill. 2009); **Eighth Circuit:** *Welsand* v. *Heffelfinger*, 2009 WL 5033963, at *2 (D. Minn. 2009); *Odom* v. *Kaiz-*

petitions for certiorari raising the issue have been filed in the seven years since the Court was unable to resolve the question in *Muhammad*, but none provided a clean vehicle with which to resolve the issue.[8]

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er, 2009 WL 2709395, at *7-8 (D.N.D. 2009); *Clark*, 2008 WL 5236036, at *10 (D.N.D. 2008); *Dible* v. *Scholl*, 2008 WL 656076, at *4-5 (N.D. Iowa 2008); *Nyssen* v. *Minn.*, 2008 WL 4999228, at *5 n.2 (D. Minn. 2008); **Eleventh Circuit:** *Domotor*, 630 F. Supp. 2d at 1375-1380 (S.D. Fla. 2009); *Gray*, 2009 WL 2634205, at *9 (N.D. Fla. 2009).

Some courts have reserved the question. See *Ferenc*, 2010 WL 4667569, at *4 (N.D. Fla. 2010), *Jones* v. *David*, 2008 WL 5045951, at *3 (S.D. Fla. 2008). Yet others avoided the issue by ruling on an alternative ground. See *Deters* v. *Alcott*, 2009 WL 3674674, at *2-3 (M.D. Fla. 2009); *Messier* v. *Devine*, 2009 WL 1321685, at *3-4 (S.D. Fla. 2009); *Baker* v. *City of Hollywood*, 2008 WL 2474665, at *6-7 (S.D. Fla. 2008).

[8] In *Collins* v. *Ainsworth*, No. 05-999, appellate jurisdiction of the case was, at best, unclear. The district court granted partial summary judgment in favor of defendants, and the plaintiffs appealed prior to the issuance of a final order. See Notice of Appeal, *Collins* v. *Ainsworth*, No. 01-cv-00081, Dkt. #147 (S.D. Miss. Apr. 14, 2005). The court of appeals found jurisdiction on the basis that plaintiffs had sought, in part, injunctive relief, and thus appellate jurisdiction was appropriate pursuant to 28 U.S.C. § 1292(a)(1). See *Collins* v. *Ainsworth*, 177 F. App'x 377, 378 (5th Cir. 2005) (per curiam). But because the summary judgment motion did not resolve a specific request for injunctive relief, jurisdiction was highly questionable. Moreover, the petition raised a second question that was irrelevant to the disposition of the issue. See Br. in Opp. at 1, *Collins*, 547 U.S. 1055 (2006) (No. 05-999), 2006 WL 656627.

In *Royal* v. *Durison*, No. 07-1056, the petitioner sought application of an impossibility exception notwithstanding the fact that he had not diligently pursued his claim through habeas during the extensive period of time that he was incarcerated. Br. in Opp., at 3-13, *Royal*, 553 U.S 1065 (2008) (No. 07-1056), 2008 WL 1803429. The petitioner first became aware of his allegedly unconstitutional sentence in 1984, but did not challenge

Review by this Court is thus necessary to conclusively settle this long-standing, important question. This case presents an ideal opportunity to do so.

C. The Majority Approach Is Correct.

The majority of circuits that recognize an impossibility exception to *Heck*'s favorable-termination rule are correct. And the exception should apply here, as the petitioner's short period of incarceration—fourteen days—rendered a federal habeas claim impossible.

1. *Heck* does not bar civil rights claims when the circumstances of conviction—such as a short period of incarceration or the imposition of a fine or probation only—render federal habeas relief impossible. At bottom, *Heck* is a doctrine that emanates from the

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it until *2004*. *Id* at 13. Because the petitioner in *Royal* was not practically barred from pursuing federal habeas, that case did not present the question at issue here.

In *Hamilton County Public Defenders Commission* v. *Powers*, No. 07-1318, the impossibility exception was not cleanly presented because the lower court had concluded that *Heck* did not apply to the case in any event because the challenge was to the procedure that led to incarceration, not the incarceration itself. See *Powers*, 501 F.3d at 603-605; see also Br. in Opp. at 7-13, *Powers*, 129 S. Ct. 44 (2008) (No. 07-1318), 2008 WL 2620142 (arguing that the *Heck* bar was not at issue).

Finally, in *Walker* v. *Munsell*, No. 08-334, the petitioner presented the impossibility exception as one of four separate questions. See Cert. Pet. at i, *Walker*, 129 S. Ct. 629 (2008) (No. 08-334), 2008 WL 4196712. In addition to the impossibility exception, petitioner contended that *Heck* should not apply to excessive force claims, even in the context of a conviction for resisting arrest (*id*. at 11-26), and also that respondents waived a *Heck* defense by failing to assert it in the answer (*id*. at 30-31). Review of the impossibility question would have necessitated consideration of these subsidiary issues.

federal habeas statute. It is designed to protect federal habeas limitations from circumvention. When a suit does not threaten federal habeas, *Heck* does not apply.

When the Court established the favorable-termination requirement in *Heck*, it presumed that claimants would have the ability to access a federal forum via a habeas petition to challenge a sentence as in violation of the Constitution. *Heck*, 512 U.S. at 486-487. In *Heck*, the Court did not confront, and consequently did not consider, a situation where an individual, through no fault of his or her own, was legally or practically precluded from pursuing a federal habeas action. Justice Souter specifically noted that this is "a sensible way to read the opinion." *Id.* at 500 (Souter, J., concurring).

An impossibility exception accords with the principle underpinning *Heck*. The Court was motivated by the concern that a civil rights claim seeking damages "would permit a collateral attack on the conviction through the vehicle of a civil suit," thus circumventing the careful limitations on habeas corpus. *Heck*, 512 U.S. at 484. Because "allowing a state prisoner to proceed directly with a federal-court [Section] 1983 attack on his conviction or sentence 'would wholly frustrate explicit congressional intent' as declared in the habeas exhaustion requirement, the statutory scheme must be read as precluding such attacks." *Heck*, 512 U.S. at 498 (Souter, J., concurring) (quoting *Preiser*, 411 U.S. at 489). Viewed in this light, *Heck*—and the federal habeas statute it is designed to protect—has no bearing on individuals unable to present a federal habeas claim. "people who were merely fined, for example, or who have completed short terms of imprisonment, probation,

or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences." *Id* at 500 (Souter, J., concurring).

Heck is thus best understood as recognizing that the federal habeas statute—which itself is a form of civil rights remedy—limits the availability of other federal remedies. When an individual may obtain relief through the federal habeas statute, he or she must use this specialized remedy to challenge a conviction. But individuals who have never come within the scope of federal habeas cannot be barred from the federal courts. This approach properly "[h]armoniz[es] [Section] 1983 and the habeas statute." *Heck*, 512 U.S. at 501 (Souter, J., concurring). To hold otherwise would "shut off federal courts altogether to claims that fall within the plain language of [Section] 1983," without any statutory basis. *Ibid.*

In *Spencer*, 523 U.S. 1, five Members of the Court interpreted *Heck*'s favorable-termination requirement precisely this way. Concurring for himself and Justices O'Connor, Ginsburg, and Breyer, Justice Souter wrote that "a former prisoner, no longer 'in custody' may bring a [Section] 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21 (Souter, J., concurring). In dissent, Justice Stevens also agreed that a claimant without a habeas remedy "may bring an action under [Section] 1983." *Id.* at 25 n.8 (Stevens, J., dissenting).[9] As the majority of circuits have found, this approach should control.

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[9] To be sure, other language in the Court's opinions may cast doubt on this conclusion. See *Heck*, 512 U.S. at 490 n 10 (the

And there can be little doubt that this result is correct insofar as this Court has confirmed that the *Heck* doctrine emanates from the federal habeas statute. In *Nelson* v. *Campbell*, 541 U.S. 637 (2004), for example, the Court found that Section 1983 was the appropriate means to challenge the method of execution. In finding *Heck* not applicable, the Court explained that the "'favorable termination' requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief—challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." *Id.* at 647-648. It is the "procedural limitations" of federal habeas that inform the scope and contours of *Heck*.

Similarly, in *Wilkinson* v. *Dotson*, 544 U.S. 74, 81 (2005), the Court explained that the *Heck*-bar applies in areas that "fall within habeas' exclusive domain." That is to say, "the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Ibid.*

Thus, because *Heck* is coterminous with federal habeas, where an individual had no possible access

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favorable-termination requirement "is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated"). See also *Spencer*, 523 U.S. at 17 (disagreeing with proposition that "a [Section] 1983 action for damages must always and everywhere be available"). The uncertainty engendered by these statements further suggests the need for review.

to the habeas remedy, *Heck* does not apply. Any other result would leave many categories of individuals—such those incarcerated for short periods of time; individuals sentenced only to probation, a fine, or community service; and persons who uncover evidence of a constitutional violation after release from custody—without any access to a federal forum where they may present challenges to their state convictions. Nothing in the federal habeas statute compels, much less suggests, such an untoward result. Instead, the federal forum should remain open to such claims, limited only to the extent necessary to protect the habeas statute against circumvention.

2. Petitioner's short period of incarceration rendered federal habeas relief unavailable. Petitioner was incarcerated for fourteen days. It was thus impossible for her to exhaust state remedies (see 28 U.S.C. § 2254(b) & (c)), much less file and prevail on a federal habeas petition during this time. See, *e.g.*, *Ferrell*, 2008 WL 4763435, at *1 ("Plaintiff was sentenced to only thirty days in jail. The length of his sentence effectively precluded him from seeking any resolution to his challenges to his incarceration through federal habeas corpus." (citation omitted)). *Heck*'s favorable-termination requirement, accordingly, does not apply in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2011

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 10-30607
Summary Calendar

LINDA A. THOMAS,
Plaintiff - Appellant
v.
STATE OF LOUISIANA,
Department of Social Services,
Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
No. 2:08-cv-04977

FILED
December 30, 2010
Lyle W. Cayce,
Clerk

Before KING, BENAVIDES, and ELROD, Circuit Judges. PER CURIAM:*

Plaintiff-Appellant Linda A. Thomas was terminated from her employment with Defendant - Appellee the Louisiana Department of Social Services. Thomas sued the defendant, alleging, *inter alia*, that she was terminated in violation of Title VII. The District Court for the Eastern District of Louisiana granted defendant's motion for summary judgment on all of Thomas's claims. We AFFIRM.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Factual And Procedural Background

Thomas was employed by the Terrebonne Parish Office of Family Support of the Louisiana Department of Social Services ("DSS"). Thomas's employment responsibilities at DSS included determining applicants' eligibility for state financial assistance and issuing electronic benefits transaction ("EBT") cards, which qualified applicants used to purchase groceries.

On November 1, 2007, Thomas received a letter from DSS stating that her employment was terminated, effective November 8, 2007. DSS stated that Thomas had been terminated because she had violated DSS policy by improperly authorizing benefits for family members and friends.

Thomas appealed her dismissal to the Louisiana Civil Service Commission ("CSC"). The CSC determined that her dismissal was proper because she "performed unauthorized computer transactions resulting in the wrongful issuance of food stamp benefits to her nephew, niece and live in boyfriend and ... she certified and activated a disaster food stamps EBT card through use of her daughter's social security number."

Thomas then filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In her charge, she claimed that DSS had discriminated against her because of her race in violation of Title VII and in retaliation for complaints about matters protected by Title VII. On July 21, 2008, the EEOC sent Thomas a "right to sue" letter, which notified her that it had dismissed her charge and that she had ninety days to commence a lawsuit against DSS.

On October 17, 2008, Thomas commenced the instant litigation against DSS in Louisiana state court. She alleged that: (1) while working for DSS, she had "experienced continuous racial, religion, and sex discrimination;" (2) DSS "retaliated, and used reprisal against the plaintiff;" (3) DSS had her falsely arrested and falsely imprisoned for theft; (4) DSS defamed her by wrongly accusing her of theft; and (5) she had been wrongfully terminated in retaliation for disclosing improper acts by DSS employees in violation of the Louisiana whistleblower statute, Louisiana Revised Statutes ("L.R.S.") § 42:1169.

DSS removed Thomas's entire claim to the District Court for the Eastern District of Louisiana on the basis of federal question jurisdiction, noting that one of claims in Thomas's complaint arose under Title VII.[1] After Thomas's complaint was removed to federal court, she was charged with criminal theft from DSS, and the proceedings in Thomas's civil suit were stayed pending the outcome of her criminal trial. On September 16, 2009, Thomas was found guilty of misdemeanor theft. Thomas was sentenced to a short jail term, placed on twelve months' supervised probation, and ordered to pay $2,133.00 in restitution to DSS.

Once Thomas's civil trial resumed, DSS moved for summary judgment on all of her claims. DSS argued that Thomas could not establish a prima facie case on any of her claims because she had been ter-

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[1] Title VII of the Civil Rights Act of 1964 ("Title VII") is codified at 42 U.S.C. §§ 2000e–e-17. Under Title VII, it is unlawful for an employer to "discharge any individual ... because of such individual's race, color, religion, gender, sex, or national origin."§ 2000e-2(a)(1).

minated for good cause. DSS also argued that Thomas was precluded from re-litigating the cause of her dismissal under the doctrines of claim preclusion and issue preclusion.[2] Finally, DSS argued that the district court lacked subject matter jurisdiction to hear Thomas's whistleblower claim because such claims may only be heard by the Louisiana Board of Ethics.

The district court granted DSS's motion for summary judgment on all of Thomas's claims, wholly adopting the Order and Reasons on Motion of the magistrate judge. Addressing Thomas's federal retaliation and discrimination claims, the magistrate judge applied the test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The magistrate judge concluded that DSS had provided a legitimate, non-discriminatory reason for her termination because it presented evidence that Thomas had been terminated for theft. The magistrate judge concluded that Thomas had not met her burden of producing evidence that this reason was a pretext for discrimination or retaliation. The magistrate judge also concluded that Thomas had not come forward with sufficient evidence to create a triable issue of fact on her state law claims. The magistrate judge did not reach DSS's preclusion and subject matter jurisdiction arguments. Thomas appealed, *pro se*,[3] arguing that the district court erred in granting DSS's motion for summary judgment.

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[2] The legal concepts of claim preclusion and issue preclusion are both codified under a Louisiana statute entitled "Res Judicata." L.R.S. § 13:4231. To avoid confusion, we refer to traditional *res judicata* as claim preclusion and collateral estoppel as issue preclusion.

[3] Thomas was represented by counsel before the district court.

II. Standard Of Review

This court reviews "an order granting summary judgment *de novo*, applying the same standards as the district court" and viewing evidence "in the light most favorable to the non-moving party." *Compliance Source, Inc. v. GreenPoint Mortg. Funding, Inc.*, 624 F.3d 252, 258 (5th Cir. 2010) (internal citations and quotation marks omitted). Summary judgment is proper when the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. Analysis

Thomas argues that the district court erred in granting summary judgment on all of her claims against DSS. We first address her federal claims and then address her claims under Louisiana state law.

A. Thomas's Federal Claims

1. Waiver

The only federal claims Thomas has preserved for appeal are her Title VII racial discrimination and her retaliation claims. In her complaint, Thomas stated she that had "experienced continuous racial, religion, and sex discrimination," and that DSS had "retaliated, and used reprisal against the plaintiff and has a pattern and practice of ... allowing racial, sex, and age motivate[d] working conditions." Thomas's appellate brief, however, mentions only retaliation and racial discrimination. Although this court liberally construes the briefs of *pro se* litigants, such litigants must nonetheless brief an issue to preserve it for appeal. *Longoria v. Dretke*, 507 F.3d 898, 901 (5th Cir. 2007). Because Thomas discussed only re-

taliation and racial discrimination in her brief before this court, she has abandoned her claims of religious, gender, and age discrimination.

2. Claim Preclusion

DSS argues that the doctrine of claim preclusion prevents Thomas from re-litigating the reason for her termination in her remaining claims. DSS points to three prior adjudications of Thomas's federal claims. First, a CSC referee found her termination was justified. The CSC denied the application for review of the referee's decision, and it became a final decision of the CSC. Second, an administrative law judge denied Thomas's claim for unemployment benefits because she was terminated for misconduct. This decision was affirmed by the state trial court. Third, Thomas was convicted in Louisiana state court for theft from DSS.

Because the judgments in this case were rendered by Louisiana courts and agencies, Louisiana law governs the preclusive effect of those judgments. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436 (5th Cir. 2000). Under Louisiana law,

> [e]xcept as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> . . . .
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the

> judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

L.R.S. § 13:4231 (2006).

An administrative decision involving Title VII claims that is not reviewed by a state or federal court may not preclude a subsequent Title VII claim. *See Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796 (1986) ("Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims."). It is not clear from the record before us whether Thomas appealed the CSC ruling that her termination was justified to the state court. Accordingly, we decline to give the CSC ruling preclusive effect.

We also decline to give preclusive effect to the decision of the administrative law judge denying Thomas unemployment benefits. A finding of law or fact made in determining eligibility for unemployment benefits

> shall not be used as conclusive evidence in any separate or subsequent action or proceeding between an individual and his or her present or prior employer brought before an arbitrator, court, or judge of the state of Louisiana or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

L.R.S. § 23:1636. There is no dispute that the instant action is separate from Thomas's claim for unemployment benefits. Therefore, these claims are not barred by the administrative law judge's decision denying her those benefits.

Finally, Thomas's criminal conviction for theft does not preclude her Title VII racial discrimination and retaliation claims. The plaintiff and defendant in both suits must be identical for the subsequent claim to be precluded. *Burguieres v. Pollingue*, 843 So. 2d 1049, 1054 (La. 2003). The parties need not share the same "physical identity," but "must appear in the same capacities in both suits" for a final judgment in the first litigation to preclude a second suit. *Id.* Nonetheless, DSS was not a "party" to Thomas's criminal trial for purposes of claim preclusion. DSS's role in Thomas's criminal prosecution was that of a victim; it did not prosecute her for her theft and the ultimate responsibility for proving her guilt did not rest with DSS. *See Hawthorne v. Couch*, 946 So.2d 288, 296–7 (La. Ct. App. 2006) (concluding that claim preclusion did not apply to a party on whose behalf prior lawsuit was brought, but who was not a party in any capacity in the prior lawsuit). In Thomas's civil suit, by contrast, DSS itself must justify Thomas's termination because a seemingly legitimate reason for termination, like theft, does not insulate it from liability for that termination if it is a pretext for an illegal employment action. *See McDonnell Douglas*, 411 U.S. at 805. Thus, claim preclusion does not bar Thomas's Title VII racial discrimination and retaliation claims.

3. Issue Preclusion

DSS also argues that Thomas's criminal conviction for theft precludes her from re-litigating wheth-

er she violated DSS policy and whether good cause existed to terminate her. Under Louisiana's doctrine of issue preclusion a "judgment in favor of either the plaintiff or defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment." L.R.S. § 13:4231(3). To be guilty of theft a defendant must "misappropriat[e] or tak[e] ... anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct" with "[a]n intent to deprive the other permanently." L.R.S. § 14:67.

DSS must prove that Thomas's violation of DSS policy and DSS's justification for firing Thomas were essential to her criminal conviction and actually litigated in her criminal trial. Given the language of the statute under which Thomas was convicted, the Louisiana state court necessarily found that Thomas misappropriated or took DSS property without DSS's consent or by fraudulent conduct. Although the criminal trial may have addressed whether Thomas had violated DSS policy and whether DSS terminated her for cause, neither finding would have been essential to finding her guilty of theft from DSS. Furthermore, DSS has not in any way demonstrated that Thomas actually litigated her violation of DSS policy or DSS's justification for terminating her in the criminal trial. Therefore, we conclude that Thomas's criminal conviction does not preclude her from re-litigating whether she had violated DSS policy and whether she had been terminated for cause. *See Kelty v. Brumfield*, 633 , 633 So. 2d 1210, 1215 (La. 1994) ("The doctrine of [claim and issue preclusion] cannot be invoked unless all its essential elements are present. ... and each necessary element must be es-

tablished beyond all question." (internal citations omitted)).

4. Thomas's Title VII Discrimination and Retaliation Claims

There is no dispute that Thomas's remaining claims under Title VII are governed by the *McDonnell Douglas* burden-shifting framework applied by the magistrate judge. Under the *McDonnell Douglas* framework, the plaintiff bears "the initial burden ...of establishing a prima facie case of racial discrimination." 411 U.S. at 802. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer meets this burden, then the plaintiff must "demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *Id.* at 805.

To establish a prima facie case of racial discrimination, Thomas must establish that she

> (1) is a member of a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, ... that other similarly situated employees were treated more favorably.

Bryan v. McKinsey & Co., Inc., 375 F.3d 358, 360 (5th Cir. 2004). As evidence that her termination was racially motivated, Thomas notes that the DSS administrator for her office, Ms. Bonnie Rehage, "segregated [her] from other black co-workers, by putting [her] in a room with all White co-workers." Thomas also alleges that Rehage failed to reprimand two

white co-workers who were involved in a dispute with Thomas.

DSS did not dispute that Thomas stated a prima facie case of racial discrimination because it "did not wish to list the elements necessary for plaintiff to establish a prima facie case." Instead, DSS provided the district court with a legitimate, non-discriminatory reason for Thomas's termination: her improper processing of benefits for family members and her live-in boyfriend in violation of DSS policy. *See Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001) (a violation of employer's written policies that could result in termination is a legitimate, non-discriminatory reason for termination under Title VII). Thus, the burden shifted back to Thomas to prove that DSS's rationale for her termination was a pretext for its allegedly racially motivated decision to terminate her.

Thomas has not met this burden. She has not provided any evidence from which the district court could conclude that she was replaced with someone outside of her protected class. Nor has Thomas presented any evidence that DSS retained similarly situated employees who had violated the same or similar DSS policies, which would be necessary to establish a disparate treatment claim. *See Wallace*, 271 F.3d at 221 ("We have held that in order for a plaintiff to show disparate treatment, she must demonstrate that the misconduct for which she was discharged was nearly identical to that engaged in by an employee not within her protected class whom the company retained." (citation and internal quotation marks omitted)).

Thomas did allege that Rehage sided against her in a dispute with white co-workers. However, Tho-

mas does not claim that she suffered an adverse employment action as a result of this dispute. Instead, she cryptically hints at testimony she will produce at trial from co-workers "about the goings on at the Terrebonne Office of Family Support." Even read broadly, this statement is not sufficient to create a genuine issue of material fact as to whether her termination was the result of racially motivated employment discrimination in violation of Title VII. *See Douglass v. United Servs. Auto. Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason."). Therefore, the district court properly granted DSS's motion for summary judgment on Thomas's Title VII racial discrimination claim.

To establish a prima facie case of retaliation for opposing DSS's discriminatory practices, Thomas must prove that (1) she "engaged in protected activity"; (2) she "suffered an adverse employment decision"; and (3) "a causal link exists between the protected activity and the adverse employment decision." *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 684 (5th Cir. 2001). Thomas claims her termination was in retaliation for filing a grievance against her supervisors and for being part of a potential class action lawsuit against several DSS supervisors for harassment of DSS employees. Rehage was named in the grievance and subsequently became the administrator of the DSS office where Thomas worked. Thomas claims that, in retaliation for the grievance Thomas filed against her, Rehage initiated the investigation that resulted in her termination.

As with Thomas's racial discrimination claim, DSS does not argue that Thomas has failed to make a prima facie case of retaliation, but rather justifies her termination by stating that Thomas violated DSS policy. This meets DSS's burden of stating a legitimate, non-discriminatory reason for termination. *See Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1301–02 (5th Cir. 1994).

Thomas again fails to meet her burden of demonstrating that DSS's stated reason for her termination was merely a pretext for retaliatory termination. Thomas has not pointed to any evidence that DSS retained other employees who violated similar policies and filed grievances against DSS administrators and supervisors. *See id.* Therefore, the district court properly granted DSS's motion for summary judgment on Thomas's retaliation claim.

B. Thomas's Louisiana State Law Claims

1. Thomas's False Arrest and False Imprisonment Claims

Thomas argues that the district court erred in granting DSS's motion for summary judgment on her false arrest and false imprisonment claims. DSS correctly counters that those claims are barred by the favorable termination rule of *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Supreme Court held that a plaintiff was barred from bringing a claim under 42 U.S.C. § 1983 that would challenge the validity of an outstanding criminal conviction when such a claim would "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 486. Instead, a plaintiff could only bring a § 1983 claim challenging the constitutionality of her conviction or sentence if she

proved "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a district court's issuance of a writ of habeas corpus." *Id.* at 487. Thomas has never contested the fact of her criminal conviction and has not presented any evidence that it was terminated in her favor. Furthermore, her claims for false arrest and false imprisonment against DSS would necessarily require the district court to re-evaluate the lawfulness of her arrest and criminal conviction because proof of those claims requires proof that both were unlawful. *See Harrison v. State Through Dept. of Pub. Safety & Corrs.*, 721 So. 2d 458, 461 (La. 1998). Thus, the favorable termination rule bars her state law false imprisonment and false arrest claims.[4]

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[4] Although *Heck* applied to a claim under 42 U.S.C. § 1983 for unconstitutional imprisonment, Thomas has never argued that it does not apply with equal force to state law claims. Therefore, she has "waived any argument that [her] state-law claims should be addressed apart from *Heck*." *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 652 n.3 (5th Cir. 2007).

Assuming the favorable termination rule does not bar Thomas's state law claims for false arrest and false imprisonment, the district court's judgment was still proper. The torts of false arrest and false imprisonment both require Thomas to prove that she was detained and that the detention was unlawful. *Harrison*, 721 So. 2d at 461, 465 n.9. As DSS rightly points out, Thomas cannot state a claim for either false arrest or false imprisonment because she was convicted of the crime for which she was arrested and imprisoned. *See id.* at 465 n.9 ("[A] person who provides the police with accurate information upon which the police exercise judgment is not liable for false arrest."); *Restrepo v. Fortunato*, 556 So. 2d 1362, 1363 (La. Ct. App. 1990) ("As [plaintiff] was convicted of the crime for which he was ar-

Nevertheless, Thomas urges us not to apply the favorable termination rule to her complaint because "she is no longer in prison and has already served her term." This argument is unavailing, however, because this circuit applies the favorable termination rule even when the plaintiff is no longer in custody. *See Randell v. Johnson*, 227 F.3d 300, 301–02 (5th Cir. 2000) (per curiam).[5]

2. Thomas's Defamation Claim

In her complaint, Thomas stated that she "was wrongly accused of theft and was slandered and defamed as a result." In its motion for summary judgment, DSS argued that Thomas could not make out a prima facie case for defamation because any statements regarding Thomas's theft of DSS property were true. *See* L.R.S. § 13:3602 ("it shall be lawful for the defendant to plead in justification the truth of the slanderous, defamatory or libelous words or matter"). Thomas's attorney did not address this argument—or otherwise assert a defamation claim—in Thomas's response to DSS's motion for summary judgment, thereby waiving any argument that statements regarding her theft were false. *See, e.g., Keenan v. Tejada*, 290 F.3d 252, 262 (5th Cir. 2002) ("If a party fails to assert a legal reason why sum-

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rested and indicted, and the conviction was affirmed by this court, he cannot show that his detention was unlawful.").

[5] In *Randell*, we noted that several other circuits do not apply *Heck*'s favorable termination rule when the plaintiff is no longer in custody. 277 F.3d at 301. The Supreme Court has suggested that this issue is unsettled. *See Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004). Regardless of this uncertainty, *Randell* remains good law in this circuit, and we share its reluctance to "announce for the Supreme Court that it has overruled one of its decisions." *Randell*, 227 F.3d at 301.

mary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal." (citation and internal quotation marks omitted)). Therefore, the district court properly granted DSS's motion for summary judgment on her defamation claim.

3. Thomas's Louisiana Whistleblower Claim

Thomas's complaint alleged that DSS had violated L.R.S. § 42:1169 when it fired Thomas in retaliation for her testimony against DSS employees. In its motion for summary judgment, DSS argued that the district court lacked subject matter jurisdiction over Thomas's claim under L.R.S. § 42:1169 because that statute does not provide for a private right of action. In Thomas's response, she conceded that L.R.S. § 42:1169 "may only provide an administrative remedy." Thomas makes an identical concession in her brief before this court, so we need not address whether Thomas had a valid claim under that statute.

In response to DSS's motion for summary judgment, Thomas also argued that "public employees could also have a valid cause of action under [L.R.S. §] 23:967." Section 23:967 prohibits an employer from taking "reprisal against an employee." However, as defined by statute, "reprisal" does not "prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such." L.R.S. § 23:967(C)(1). As DSS points out, the reason for Thomas's termination was her violation of DSS policy. Thomas has not disputed her violation of these policies beyond conclusory statements in her pleadings here and below. Nor has she stated how she is otherwise entitled to relief under L.R.S. § 23:967. Therefore, the district

court properly granted DSS's motion for summary judgment on Thomas's whistleblower claim.

IV. Conclusion

For the above reasons, we AFFIRM the judgment of the district court granting DSS's motion for summary judgment on all of Thomas's claims.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
LINDA A. THOMAS
VERSUS
STATE OF LOUISIANA,
DEPT. OF SOCIAL SERVICES
CIVIL ACTION
NO. 08-4977
MAGISTRATE JUDGE
JOSEPH C. WILKINSON, JR.

ORDER AND REASONS ON MOTION

This is an employment action brought principally under Title VII in which plaintiff, Linda A. Thomas, sued her former employer, the Louisiana Department of Social Services ("the State"), in the 32nd Judicial District Court for the Parish of Terrebonne, State of Louisiana. She asserted various claims, including age, racial, religious and sexual discrimination, hostile work environment, disparate treatment, reprisal and retaliation resulting in wrongful termination, state law false arrest and imprisonment. Record Doc. No. 1-1, Petition. The State removed the action to this court on the basis of federal question jurisdiction. Record Doc. No. 1, Notice of Removal.

This matter was referred to the undersigned Magistrate Judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties. Record Doc. No. 7. Thereafter, on defendant's motion with plaintiff's consent, proceedings in the case were stayed and the case was administratively closed to protect plaintiff's Fifth Amendment rights while her related criminal case was pending in the 32nd Judicial District Court

for the Parish of Terrebonne ("32nd JDC"). Record Doc. Nos. 9 and 10. The case remained stayed almost seven (7) months, until the stay was lifted and the case reopened upon counsel's advice that plaintiff's trial in the related criminal case had been concluded. Record Doc. No. 16.

Defendant, the State of Louisiana, through its Department of Social Services, Office of Family Support, has now filed a motion for summary judgment, supported by various exhibits generated by the governmental agencies previously involved in addressing plaintiff's claims, including the EEOC (Exhibit A); the State Department of Social Services (Exhibits B, C, D, E); the 32nd JDC (Exhibits F, with referenced and attached documents from the Terrebonne Parish District Attorney's Office Department of Probation, and H, with the referenced and attached decisions of the State Board of Review and Department of Labor); the State Department of Civil Service with an attached records certification (Exhibit G); and the affidavit of Gail Denham, verifying the State's exhibits and attesting that plaintiff's employment termination was not discriminatory, but was based on her misconduct in falsifying and otherwise misusing State Department of Social Services financial assistance and procedures (Exhibit I). Record Doc. No. 21.

Based upon this evidence, the State's motion asserts five (5) arguments in favor of dismissal of plaintiff's case in this court: (1) plaintiff has no evidence sufficient to establish a prima facie case of discrimination or retaliation; (2) plaintiff has no evidence sufficient to rebut defendant's legitimate nondiscriminatory reasons for its actions; (3) plaintiff has no evidence sufficient to establish the essential elements of her other causes of action; (4) plaintiff's

claims are barred by res judicata and/or collateral estoppel; and (5) La. Rev. Stat. § 42:1169 provides no private right of action.

After obtaining an extension of time to respond, Record Doc. No. 23, plaintiff filed a memorandum in opposition to defendant's motion for summary judgment. Record Doc. No. 24. She principally argues that she is innocent of the criminal charges upon which she was fired and that the various state administrative proceedings upholding her termination for the reasons asserted by defendant do not bar her present claims. The only pieces of evidence submitted with the opposition are three unsworn letters by plaintiff to state agencies (Exhibits A, B and C), a copy of the decision of the State Department of Labor administrative law judge (Exhibit D), and a cover letter to a lawyer for the State from the Louisiana Workforce Commission (Exhibit E).

Having considered the complaint, the record, the submissions of the parties and the applicable law, **IT IS ORDERED** that defendant's motion for summary judgment is **GRANTED**. For the following reasons, I find that it is unnecessary to address defendant's fourth and fifth arguments because plaintiff has offered no competent evidence sufficient to create a triable issue of fact as to claims on which she bears the burden of proof at trial, so that summary judgment under the *Celotex* standard described below must be entered against her.

I. ANALYSIS

A. Standard of Review for Summary Judgment Motions

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on

file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that it believes demonstrate the absence of a genuine issue of material fact, but it is not required to negate elements of the nonmoving party's case. *Capitol Indem. Corp. v. United States*, 452 F.3d 428, 430 (5th Cir. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is 'material' if its resolution in favor of one party might affect the outcome of the action under governing law. An issue is 'genuine' if the evidence is sufficient for a rational trier of fact to return a verdict for the nonmoving party." *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

To withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial *must come forward with evidence* to support the essential elements of its claim. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 712 (5th Cir. 1994) (citing *Celotex*, 477 U.S. at 321-23) (emphasis added). "[A] complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex*, 477 U.S. at 323; *accord Capitol Indem. Corp.*, 452 F.3d at 430.

"Factual controversies are construed in the light most favorable to the nonmovant, *but only if both parties have introduced evidence showing that an actual controversy exists.*" *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432 (5th Cir. 1998) (emphasis added);

accord Murray v. Earle, 405 F.3d 278, 284 (5th Cir. 2005). "*We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.*" *Badon v. R J R Nabisco Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (quotation omitted) (emphasis in original). "Conclusory allegations unsupported by specific facts . . . will not prevent the award of summary judgment; 'the plaintiff [can]not rest on his allegations . . . to get to a jury without any "significant probative evidence tending to support the complaint."'" *National Ass'n of Gov't Employees*, 40 F.3d at 713 (quoting *Anderson*, 477 U.S. at 249).

"Moreover, the nonmoving party's burden is not affected by the type of case; summary judgment is appropriate in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quotation omitted) (emphasis in original); *accord Duron v. Albertson's LLC*, 560 F.3d 288, 291 (5th Cir. 2009).

B. Application of Summary Judgment Standard to this Record

The only competent *evidence* in connection with this motion are the uncontroverted affidavits and exhibits filed by defendant. In summary, that evidence establishes that plaintiff was employed as a social service analyst by the State Department of Social Services, a classified position subject to State civil service rules and regulations. Her duties included interviewing and determining eligibility of applicants for various forms of State financial assistance, including the power to issue debit cards to purchase food (formerly food stamps). An investigation by the

State determined that plaintiff misused her position and violated State regulations by improperly activating and/or issuing food purchasing debit cards for her niece, nephew and live-in boyfriend and using the social security number of her daughter, a Texas resident, to create an application under a false name and issue a debit card for Louisiana food stamps. Defendant's evidence reflects that every state agency that has reviewed plaintiff's termination has upheld it as appropriate. In addition, the evidence reflects that plaintiff was tried and convicted criminally of misdemeanor theft and sentenced to six months in prison and restitution in the amount of $2,133.00 for acts arising from and related to the same misconduct for which she was fired. Thus, among other things, the overwhelming and uncontroverted evidence submitted by defendant in support of its motion establishes that plaintiff was fired for legitimate, non-discriminatory, non-retaliatory reasons that rebut the unsubstantiated allegations as to all causes of action asserted by plaintiff in this lawsuit.

The only "evidence" submitted by plaintiff in opposition to the motion are her unsworn letters to state agencies containing nothing more than plaintiff's self-serving and uncorroborated allegations, conclusions and speculation. Plaintiff's submissions are wholly insufficient to defeat summary judgment in favor of defendant.

Plaintiff clearly bears the burden of proof as to *all* causes of action, both state and federal, asserted in her original petition. For example, "[f]or [plaintiff] to establish a *prima facie* case of retaliation [s]he must show (1) that [s]he engaged in a protected activity; (2) that an adverse employment action occurred; and (3) that a causal link existed between the

protected activity and the adverse action. . . ." *Drake v. Nicholson*, No. 07-60855, 2009 WL 1043810, at *3 (5th Cir. Apr. 20, 2009) (citing *Holloway v. VA*, No. 08-20212, 2009 WL 270175, at *2 (5th Cir. Feb. 5, 2009); *LeMaire v. Louisiana*, 480 F.3d 383, 388 (5th Cir. 2007); *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007)). If, as here, defendant submits evidence sufficient to establish legitimate non-discriminatory reasons for its employment action, "the burden shifts back to [plaintiff]. Her ultimate burden is to show pretext; that is, to prove by a preponderance that [defendant] fired her not for its stated reasons, but in retaliation" for her own actions. *Strong v. University Health Care Sys., L.L.C.*, 482 F.3d 802, 806 (5th Cir. 2007) (citing *Septimus v. University of Houston*, 399 F.3d 601, 607-08 (5th Cir. 2005) (quoting *Septimus*, 399 F.3d at 608)).

Similarly, plaintiff bears the burden of proof as to all of her Title VII discrimination claims, regardless of their specific characterization. As to such claims, plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). She can satisfy this burden with circumstantial evidence that (1) she was a member of a protected class, (2) she was qualified for the position, (3) her employment was terminated and (4) she was replaced by an individual of a different race, or that defendant treated similarly situated individuals of a different race more favorably than it treated her. *Jackson v. Dallas County Juvenile Dep't*, 288 Fed. Appx. 909, 2008 WL 2916375, at *2 (5th Cir. 2008) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802; *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004)).

If a prima facie case is present, a presumption of discrimination arises and the

> burden then shifts to the employer to produce a legitimate, nondiscriminatory reason for [plaintiff's] termination. This causes the presumption of discrimination to dissipate. *The plaintiff then bears the ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against her because of her protected status.*
>
> To carry this burden, the *plaintiff must produce substantial evidence* indicating that the proffered legitimate nondiscriminatory reason is a pretext for discrimination. The plaintiff must rebut each nondiscriminatory reason articulated by the employer. A plaintiff may establish pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or "unworthy of credence." An explanation is false or unworthy of credence if it is not the real reason for the adverse employment action.

Laxton v. Gap Inc., 333 F.3d 572, 578 (5th Cir. 2003) (emphasis added) (citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000)) (additional citations omitted).

And, of course, plaintiff also bears the burden of proof of every essential element as to her state law claims of false arrest and imprisonment. See *Tabora v. City of Kenner*, 650 So.2d 319, 322-24 (La. App. 5th Cir. 1995) (dismissal of plaintiff's Louisiana state law claims of false arrest and false imprisonment af-

firmed where plaintiff failed to prove essential elements of either claim).

The *Celotex* standard detailed above makes it clear that under these circumstances, plaintiff must come forward with competent *evidence* sufficient to support the essential elements of her claims and to demonstrate disputed material facts necessitating trial. She cannot rest on her pleadings, mere allegations, speculation and self-serving unsworn conclusions. In the absence of the presentation of competent evidence by plaintiff, especially in light of the overwhelming body of uncontroverted evidence supporting defendant's position submitted with this motion, entry of summary judgment in defendant's favor is wholly appropriate.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that defendant's motion for summary judgment is GRANTED, and that all of plaintiff's claims are DISMISSED WITH PREJUDICE, plaintiff to bear all costs of this proceedings. Judgment will be entered accordingly.

New Orleans, Louisiana, this 26th day of May, 2010.

JOSEPH C. WILKINSON, JR.
UNITED STATES MAGISTRATE JUDGE